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SUPREME COURT, U.S.

No. 07-949

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT WHITE,

Petitioner,

v.

JOSEPH B. COLLINS,
CHAPTER 7 TRUSTEE FOR
CK LIQUIDATION CORPORATION
(F/K/A CADKEY CORPORATION),

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION

Michael J. Goldberg
Counsel of Record
Cohn Whitesell & Goldberg LLP
101 Arch Street
Boston, MA 02110
(617) 951-2505

Questions Presented

Contrary to the Petitioner's assertions otherwise, the only issues on appeal before the lower courts and, thus, the only questions presented for this Court's consideration are as follows:

1. Whether the Court of Appeals for the First Circuit ("First Circuit") properly concluded that the United States Bankruptcy Court for the District of Massachusetts (Western Division) (the "Bankruptcy Court") did not err as a matter of law in denying Petitioner's second Motion to Vacate the Sale Order for failure to meet the requirements of Fed. R. Civ. P. 60(b)(4)?

2. Whether the First Circuit properly concluded, based on the record of the case and the Bankruptcy Court's finding that Petitioner has repeatedly filed frivolous pleadings, causing interference with the estate's administration, that the Bankruptcy Court did not abuse its discretion in restraining and enjoining Petitioner from filing, *pro se*, any further papers, pleading or documents in the Chapter 7 case, except those which relate to: (1) any matter in which Petitioner is a named respondent or defendant; or (2) an appeal of any order of the Bankruptcy Court?

3. Whether the First Circuit properly concluded that the Bankruptcy Court did not err as a matter of law in denying Petitioner's claim for administrative expense priority under

Sections 503(b) and 507(a)(1) of the Bankruptcy Code?

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Introduction

Petitioner Robert White ("White" or "Petitioner") has presented no "compelling reasons" for his Petition for a Writ of Certiorari ("Petition") to be granted. See Sup. Ct. R. 10. Specifically, Petitioner fails to demonstrate, or even argue, that the First Circuit's June 29, 2007 Judgment is in conflict with a decision of this Court or another Court of Appeals or that the First Circuit decided an important federal question that has not been settled by this Court or conflicts with relevant decisions of this Court. See Sup. Ct. R. 10 (a)-(c). In fact, Petitioner has not even carried his significantly less strenuous burden of showing that the Bankruptcy Court (i) erred in denying his second Motion to Vacate the Sale Order for failure to meet the requirements of Fed. R. Civ. P. 60(b)(4), (ii) abused its discretion in restraining and enjoining him from filing, *pro se*, any further papers, pleadings or documents in the Chapter 7 case, except in limited circumstances, or (iii) erred in denying his claim for administrative expense priority under Sections 503(b) and 507(a)(1) of the Bankruptcy Code – which would, in any event, constitute insufficient grounds to grant the Petition. See id.

Instead, as has been his practice throughout these proceedings (and his numerous other appeals), Petitioner advances several frivolous arguments that are (i) without merit, (ii) irrelevant to the questions presented, (iii) have not been preserved or (iv) were contained in his prior certiorari petition to this Court, denied on February 21, 2006. None of Petitioner's arguments warrant this Court's

consideration (or reconsideration as the case may be). Petitioner has failed completely to carry his burden of demonstrating that there are compelling reasons for this Court to grant the Petition. Accordingly, like his prior related certiorari petition - which sought to overturn the same Bankruptcy Court order - the Petition should be denied.

Statement of the Case

Supreme Court Rule 24.1(g) requires that the statement of the case "set[] out the facts material to the consideration of the questions presented." The Petitioner's "Statement of the Case" is replete with misstatements, mischaracterizations and irrelevant background, and does not support the consideration of the questions presented. The Respondent submits the following statement of the case, focusing on the relevant facts in the record and, where appropriate, identifying the misstatements made by the Petitioner, as required by Supreme Court Rule 15.2.

Background

Petitioner is an unsecured creditor of the Debtor, and was a potential bidder for its assets, who has, over the past four years, employed a strategy of filing numerous duplicative and frivolous pleadings and appeals in an attempt to advance his economic interests in the Debtor's bankruptcy case. Originally a member of the Official Committee of Unsecured Creditors (the "Committee") appointed upon the filing of the Debtor's Chapter 11 petition for relief, Petitioner sought to block the sale of the Debtor's assets, being unable to procure financing for his own

purchase. His objection overruled, Petitioner – as he was entitled to – filed an appeal of the order approving the sale (the "Sale Order"). But during the course of his Sale Order appeal, which concluded following this Court's denial of his certiorari petition, Petitioner also engaged in filing an endless stream of additional pleadings, including a motion to vacate the Sale Order while his appeal therefrom was pending, a motion for reconsideration of the denial of the motion to vacate the sale order, a motion seeking disgorgement of the fees of counsel for the Debtor and the Committee (which had already been approved by the Bankruptcy Court after notice to Petitioner), and appeals from all of the orders denying the above motions.

Petitioner's latest filings (the subject of his Petition) are no different than the numerous pleadings and appeals that he has filed over the past few years. Once again, Petitioner seeks to abuse the court process by (i) attempting to relitigate the Sale Order for the third time and (ii) seeking a claim status in the Chapter 7 case to which he is clearly not entitled. The Bankruptcy Court recognized the baseless nature of Petitioner's latest pleadings, denying both his second Motion to Vacate Sale Order and his Application for Payment of Priority Administrative Claim. In an effort to protect the integrity of the bankruptcy process going forward, the Bankruptcy Court imposed restrictions on Petitioner to reduce his opportunity for filing frivolous papers in the future. The United States District Court for the District of Massachusetts (the "District Court") and First Circuit affirmed both

Bankruptcy Court orders and upheld the filing restriction.

Sale Order; Appeals

The Debtor commenced a Chapter 11 case by filing a voluntary petition for relief on August 22, 2003. On August 29, 2003, the Debtor moved the Bankruptcy Court for an order approving the sale of substantially all of the Debtor's assets (the "Sale Motion"). [Bankr. Docket No. 25.][1] On or about October 9, 2003, Petitioner, who was represented by counsel throughout the Bankruptcy Court proceedings on the Sale Motion, filed an objection thereto (the "White Objection") on the basis that unsettled litigation against the Debtor's estate (the "Bowers Litigation") would adversely affect the sale price, and that more time was needed after the Bankruptcy Court's determination of the issues in the Bowers Litigation for potential purchasers to assess the impact that the claim of Harold Bowers ("Bowers") would have on the sale process. [Bankr. Docket No. 102.]

The Bankruptcy Court heard argument and testimony on the Sale Motion at hearings held on October 20, 2003, October 27, 2003, October 28, 2003, October 30, 2003 and November 6, 2003 (collectively, the "Sale Hearing"). In the meantime,

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[1] Petitioner filed an appendix with the Petition. Accordingly, record cites in this brief indicate whether the item is contained in the appendix "[Pet. App. p. __]" or the Bankruptcy Court docket [Bankr. Docket No. __]", which items are part of the record below.

Bowers settled the Bowers Litigation with respect to the Debtor's estate. On November 6, 2003, the Bankruptcy Court entered the Sale Order overruling the White Objection, and approving the sale of Debtor's assets to Kubotek Corporation ("Kubotek") in a transaction involving total consideration of approximately $3,600,000.[2] [Bankr. Docket No. 121.] The Bankruptcy Court found no evidence that the Bowers Litigation negatively impacted either the sale process or the ultimate sale price. The Bankruptcy Court also found no evidence that the outcome would have been different had there been an extension of the sale date.[3] After considering the

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[2] As is discussed more fully below, $750,000 of the total consideration was paid directly to Bowers in connection with his withdrawal of the Bowers Objection and a release of claims asserted in the Bowers Litigation. Significantly, Bowers' claim in the bankruptcy constituted approximately 90% of the total of the unsecured claims listed on the Debtor's Schedules of Assets and Liabilities [Bankr. Docket No. 41]; thus, the settlement payment made directly to him had a substantial, beneficial impact on the treatment of creditors generally in the case. In his Petition, p. 36, White fails to acknowledge this significant consideration when he claims that the assets were sold for a total of $2.85 million.

[3] The Bankruptcy Court also found that, despite an inconsistency in the testimony of Kubotek's principal, Mr. Kakishita, that precluded a good faith finding under Section 363(m), there was no evidence that Kubotek conducted itself improperly before the sale. [Bankr. Docket No. 244, p. 12.] The Bankruptcy Court recognized that notwithstanding Mr. Kakishita's testimony, the Debtor's sale to Kubotek was in the best interests of the Debtor's creditors. [Id.] The Bankruptcy Court stated that it could have chosen to disqualify Kubotek from the sale altogether, but did not feel the evidence warranted such drastic action. [Id.]

White Objection and allowing Petitioner to present his objection to the court at the Sale Hearing, the Bankruptcy Court held that Petitioner's objection suffered "from a complete failure of evidence and proof."[4] [Bankr. Docket No. 243, p. 43:18-20.] The sale closed on December 2, 2003.

On November 14, 2003, Petitioner filed a notice of appeal regarding the Sale Order in the District Court. [Bankr. Docket Nos. 126 and 127.] On November 8, 2004, the District Court affirmed the Sale Order. Petitioner subsequently appealed to the First Circuit (the appeal was dismissed) and then, on December 12, 2005, Petitioner filed a petition for a writ of certiorari to this Court, which was denied on February 21, 2006. On April 17, 2007, the Court denied his petition for a rehearing.

Case Converted

On March 4, 2004, the Debtor's case was converted to a case under Chapter 7 of the Bankruptcy Code [Bankr. Docket No. 239]. On March 5, 2004, John A. Burdick was appointed as trustee in this case. Petitioner did not object to the conversion of the case. Joseph B. Collins was appointed as successor trustee in this case on March 14, 2006 (together with Burdick, as predecessor trustee, the "Trustee").

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[4] White was afforded the opportunity to present evidence in support of his position respecting the Sale Motion at the Sale Hearing, but failed to do so.

Petitioner's First Motion to Vacate; Appeals

On August 13, 2004, while his appeal of the Sale Order was still pending, Petitioner filed his first Motion to Vacate the Sale Order on the basis that estate counsel committed fraud on the Bankruptcy Court in seeking approval of the Sale Motion (the "First Motion to Vacate"). [Bankr. Docket No. 313.] The Bankruptcy Court denied the First Motion to Vacate on September 8, 2004 [Bankr. Docket No. 330] and, subsequently, Petitioner's motion for reconsideration. [Bankr. Docket No. 334.] Petitioner then filed an appeal in the District Court attacking the Bankruptcy Court's decision on his First Motion to Vacate. [Bankr. Docket No. 337.] On September 12, 2005, the District Court affirmed the Bankruptcy Court's order denying the First Motion to Vacate and, subsequently, denied Petitioner's motion for reconsideration. Petitioner unsuccessfully sought to appeal the District Court's order directly to this Court. Petitioner's time period to appeal the District Court's order has since expired.

Motion to Disgorge; Appeals

On October 12, 2004, Petitioner filed a Motion to Disgorge (the "Motion to Disgorge") seeking an order compelling the Debtor's Chapter 11 counsel, Ropes & Gray LLP, and counsel to the Official Committee of Unsecured Creditors, Sherin and Lodgen LLP ("S&L") (together with Ropes & Gray, "Estate Counsel"), to return their previously approved fees and expenses to the Debtor's estate. [Bankr. Docket No. 348.] As found by the

Bankruptcy Court, the Motion to Disgorge was based largely on a "twisting" of statements taken from the Bankruptcy Court's order denying Petitioner's First Motion to Vacate. The Bankruptcy Court rejected Petitioner's arguments, and denied the Motion to Disgorge on October 19, 2004. [Bankr. Docket No. 353.] Petitioner subsequently filed an appeal in the District Court attacking the Bankruptcy Court's decisions on the Motion to Disgorge. [Bankr. Docket No. 357.] On December 10, 2004, after the Trustee had already undertaken to prepare and designate the record appendix, the District Court dismissed Petitioner's notice of appeal for failure to pay the filing fee.

In its order denying the Motion to Disgorge, the Bankruptcy Court also ordered that Petitioner appear and show cause "why he should not be sanctioned pursuant to Fed. R. Bank. P. 9011(c)(1)(b), on account of the filing of this frivolous motion." [Bankr. Docket No. 353.] On November 16, 2004, the Bankruptcy Court held the show cause hearing and made the following ruling:

> I find that the allegations made in the motion to disgorge, particularly in the context of previous pleadings filed by Mr. White, are not warranted by – were not warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; that they were presented for an improper purpose, and that is to harass estate functionaries....

[Bankr. Docket No. 403, p. 8:6-12.] Accordingly, the Bankruptcy Court sanctioned Petitioner $2,500.00 to be paid to the Trustee within 60 days (the "Sanction Order"). [Id. at p.8:13-16, 9:6-8.]

On November 26, 2004, Petitioner appealed the Sanction Order to the United States Bankruptcy Appellate Panel for the First Circuit (the "BAP"). [Bankr. Docket Nos. 393 and 395.] Petitioner did not, however, seek a stay of the Sanction Order pending the outcome of the BAP appeal. Nevertheless, and despite the Trustee's demand for payment, Petitioner refused to pay the sanction amount. On March 11, 2005, the BAP entered an order affirming the Sanction Order (the "BAP Order"). On April 8, 2005, Petitioner appealed the BAP Order to the First Circuit.

In the time between the entry of the BAP Order and the filing of the appeal, on March 16, 2005, the Trustee – having received no response to his payment demand – filed the Chapter 7 Trustee's Motion for Contempt Against Robert White (the "Contempt Motion"), for Petitioner's failure to abide by the Sanction Order. [Bankr. Docket No. 498.]

On May 23, 2005, the Bankruptcy Court held a hearing on Petitioner's motion for a stay of the Sanction Order and an evidentiary hearing on the related Contempt Motion. At the hearing, the Bankruptcy Court concluded that Petitioner had failed to meet the standard for the issuance of a stay under Fed. R. Bankr. P. 8005 and that he was in

contempt of the Sanction Order. Specifically, the Bankruptcy Court, after conducting an evidentiary hearing at which Petitioner disclosed his ownership of two automobiles with a value of $3,500 each [Bankr. Docket No. 727, p. 12.], found that Petitioner "had, at all times, the ability to comply with [the Sanction Order] . . . ." [Bankr. Docket No. 550.] As a result of Petitioner's contempt, the Bankruptcy Court sanctioned Petitioner an additional $1,000.00, for a total amount owed of $3,500.00, and ordered Petitioner to pay the entire sanction by June 17, 2005 (the "Contempt Order"). [Id.]

On June 28, 2005, Petitioner appeared at the scheduled hearing not having paid the amount ordered by the Bankruptcy Court, claiming that he was unable to satisfy the sanction. [Bankr. Docket No. 727, pp. 12-13.] The Bankruptcy Court concluded that there was "no basis to believe that [White] had made any effort to [sell the vehicles]." [Id.] Accordingly, Petitioner was incarcerated by the United States Marshall at the Wyatt Detention Center in Rhode Island. [Bankr. Docket No. 604.] On July 12, 2005, Petitioner was brought before the Bankruptcy Court for a continued contempt hearing. The sanction had still not been paid, and the Bankruptcy Court was unconvinced that Petitioner had made any attempt whatsoever to liquidate the vehicles. Petitioner was sent back to the Wyatt Detention Center, where he stayed until August 9, 2005. On August 9, 2005, the Bankruptcy Court conducted a further contempt hearing. Payment of the sanction was still not forthcoming. In an attempt to break the stalemate, the Bankruptcy Court offered Petitioner an alternative. If Petitioner

would agree to convey the vehicles to the Trustee so that the Trustee could liquidate them, Petitioner would be released from incarceration. Petitioner accepted the alternative, was released from incarceration, and the Court continued the contempt hearing until January 31, 2006 to allow the Trustee to sell the vehicles. [Bankr. Docket Nos. 618 and 619.]

On January 10, 2006, the Trustee filed an Application to Employ Auctioneer (the "Auctioneer Application"). [Bankr. Docket No. 692.] By the Auctioneer Application, the Trustee sought to employ an auctioneer to dispose of Petitioner's vehicles. [Id.] Petitioner objected to the Auctioneer Application. [Bankr. Docket No. 694.] After a hearing on the Auctioneer Application, on January 31, 2006, the Bankruptcy Court denied the Auctioneer Application and ordered that Petitioner be "purged of any contempt of this Court's previous orders that he pay to the bankruptcy estate sanctions in the sum of $3,500 . . . ." (the "Purge Order"). [Bankr. Docket No. 708.] No other provision of the Purge Order had any effect, direct or indirect, on Petitioner.

In yet another example of Petitioner's abusive litigation practice in this case, on February 13, 2006, Petitioner appealed the Purge Order to the District Court, notwithstanding the fact that it is favorable to his interests. [Bankr. Docket No. 710.] The appeal was ultimately dismissed for failure to pay the filing fee, but not until after Petitioner appealed a decision denying his Motion to Proceed In Forma

Pauperis and after he filed a Petition for a Writ of Mandamus with the District Court.

On November 7, 2006, the First Circuit issued a Briefing Notice for the appeal of the Sanction Order. Because the sanction had already been purged, the Trustee filed a motion to dismiss the appeal on the grounds that it was moot. On June 27, 2007, the First Circuit granted the motion. Petitioner's time period to appeal the First Circuit's decision has since expired.

Second Motion to Vacate; Appeals

With this Court's denial of his first writ of certiorari, Petitioner's appellate avenues with respect to the Sale Order were closed. Nevertheless, on March 14, 2006, Petitioner filed his second Motion to Vacate Sale Order (the "Second Motion to Vacate"), arguing that the Sale Order was void under Fed. R. Civ. P. 60(b)(4) because of the Bankruptcy Court's violations of his due process rights. [Bankr. Docket No. 724.] The Bankruptcy Court denied the Second Motion to Vacate on May 9, 2006. [Pet. App. pp. 9-16.]

In the Trustee's opposition to the Second Motion to Vacate, the Trustee renewed his request that the Bankruptcy Court consider the entry of an injunction prohibiting Petitioner from filing any

further pleadings concerning the Chapter 7 case.[5] [Bankr. Docket No. 750, p. 8.] Thus, contrary to his assertions in the Petition, pp. 41-42, Petitioner was on notice of the Trustee's request, and had an opportunity to object to that request at the hearing on the Second Motion to Vacate. [Bankr. Docket No. 782, pp. 1-18.] In response to the Trustee's request, the Bankruptcy Court crafted a restriction that bars Petitioner from filing, *pro se*, any papers in the Chapter 7 case, except those which relate to: (1) any matter in which Petitioner is a named respondent or defendant; or (2) an appeal of any order of the Bankruptcy Court. [Pet. App. pp. 12-16.] Because of the difficulty the Bankruptcy Court experienced in enforcing its prior orders designed to reduce Petitioner's frivolous filings, the Bankruptcy Court provided that in the event Petitioner violates the terms of the restrictions, the filing would be struck, no party would be required to respond, and an automatic sanction of $1,000 would be imposed, payable to the Trustee on behalf of the estate. [Id.] On May 18, 2006, Petitioner filed an appeal of the order to the District Court. [Bankr. Docket No. 791.] On August 28, 2006, the District Court affirmed the order. [Pet. App. pp. 5-7.] On June 27, 2007, the First Circuit affirmed the Bankruptcy Court order, concluding that Petitioner's claim of a due process violation was "without foundation" and that the filing restriction was "properly crafted to prevent further inappropriate filings." [Pet. App. pp. 2-3.]

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[5] In light of the mounting expense to creditors resulting from White's repetitive and frivolous motion practice, the Trustee had originally asked for this relief in the Chapter 7 Trustee's Response to this Court's Order to Show Cause dated November 15, 2004. [Bankr. Docket No. 384.]

Petitioner's Application for Payment of Priority Administrative Claim; Appeals

Prior to the Petition Date, on April 1, 1998, the Debtor's predecessor-in-interest, Baystate Technologies, Inc. ("Baystate"), entered into an acquisition agreement with FastSURF, Inc., Petitioner, and David Reyburn ("Reyburn"), to purchase certain computer software (the "Acquisition Agreement"). [Bankr. Docket No. 774, p. 2.] Pursuant to the Acquisition Agreement, Baystate agreed to pay Petitioner and Reyburn royalties on subsequent sales of software products incorporating the purchased software, such royalties to be divided equally between Petitioner and Reyburn. [Id.]

When Kubotek purchased substantially all of the Debtor's assets on December 2, 2003, it declined to take assignment of the Acquisition Agreement or to assume the obligations of the Debtor to Petitioner and Reyburn thereunder. On April 4, 2006, more than two years after the sale closing, Petitioner filed the Application for Payment of Priority Administrative Claim (the "Application for Payment"). [Bankr. Docket No. 764.] By the Application for Payment, Petitioner (i) correctly acknowledged that the Acquisition Agreement was not an executory contract, and (ii) erroneously claimed that he is entitled to an administrative claim for royalties arising under the Acquisition Agreement from July 1, 2003 to the sale closing date

– December 3, 2003 (the "Royalty Claim").[6] [Id.] On May 9, 2006, the Bankruptcy Court denied the Application for Payment, finding and ruling that Petitioner "failed to establish that his claim, if any, for royalties satisfies the conditions necessary to establish priority under [Sections] 503(b) and 507(a)(1) [of the Bankruptcy Code]." [Pet. App. pp. 18-20.][7] On May 18, 2006, Petitioner filed an appeal of the order to the District Court. [Bankr. Docket No. 791.] On August 28, 2006, the District Court affirmed the order. [Pet. App. pp. 5-7.] On June 27, 2007, the First Circuit affirmed the order.

Reasons Why The Petition Should Be Denied

This Court should deny the Petition because the Petitioner has failed to present any compelling reasons for granting his Petition. In any event, the Petitioner's arguments are entirely without merit, were properly decided by the First Circuit, and are not worthy of this Court's review.

I. The First Circuit Judgment Does Not Warrant this Court's Review

Petitioner has presented no "compelling reasons" for his Petition to be granted. See Sup. Ct. R. 10. Specifically, Petitioner fails to demonstrate,

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[6] This period includes the prepetition period of July 1, 2003 to the Petition Date.

[7] Petitioner's Appendix provides an incomplete copy of the Bankruptcy Court's Order. The quoted language above is correct, but the order contained in the Petitioner's Appendix is missing much of the cited language.

or even argue, that the First Circuit's judgment is in conflict with a decision of this Court or another Court of Appeals or that the First Circuit decided an important federal question that has not been settled by this Court or conflicts with relevant decisions of this Court. See Sup. Ct. R. 10 (a)-(c). For this reason alone, the Petition does not warrant this Court's review, and should be denied.

II. Petitioner's Arguments are Without Merit and Do Not Warrant this Court's Review

In any event, the Petitioner's arguments are without merit and have been properly considered and rejected by the First Circuit, District Court, and Bankruptcy Court. The Second Motion to Vacate and Application for Payment are merely a continuation of Petitioner's attack on the Debtor's estate and represent nothing more than an attempt to present new arguments – or slightly modified arguments – challenging the merits of the Sale Order, at the continuing expense of the Debtor's estate. Petitioner appears intent on following this course until he finds some way to derive a payment, from either the Trustee or Kubotek, to which he simply is not entitled under the Bankruptcy Code.

A. The Bankruptcy Court's Order Denying the Second Motion to Vacate and Enjoining Petitioner from Filing Further Pro Se Pleadings in the Chapter 7 Case is Entirely Appropriate

1. The Second Motion to Vacate Fails to Meet the Strict Requirements for Relief set forth in Fed. R. Civ. P. 60(b)(4)

By rehashing old arguments and fabricating due process violations, Petitioner, through the Second Motion to Vacate, is attempting to relitigate the Sale Order for a third time, when he has no right to do so. The First Circuit, District Court and Bankruptcy Court properly concluded that the Second Motion to Vacate fails to meet the strict requirements for relief set forth in Fed. R. Civ. P. 60(b)(4) (incorporated in Fed. R. Bankr. P. 9024). More specifically, (1) the Second Motion to Vacate was not timely made, and (2) the Sale Order is not void, as the Bankruptcy Court had jurisdiction to enter the Sale Order and in no way violated the due process rights of any party. The Second Motion to Vacate is completely unfounded, and the First Circuit was correct in affirming the Bankruptcy Court's denial.

2. The Second Motion to Vacate Was Not made Within a Reasonable Time

Some two and one-half years after the entry of the Sale Order, Petitioner is claiming, for the first time, that it is "void" within the meaning of Fed. R. Civ. P. 60(b)(4), because it violated his due process rights. [Bankr. Docket No. 724.] Fed. R. Civ. P. 60(b) provides, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void. . . . The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

Fed. R. Civ. P. 60(b).

Pursuant to Fed. R. Civ. P. 60(b), a motion seeking relief under subsection (4) must be made within a "reasonable time." Fed. R. Civ. P. 60(b). "What is 'reasonable' depends upon the circumstances of the particular case. The circumstances to be considered include the length of the delay, the justification for it, and the prejudice (if any) associated with the granting of relief." Farm Credit Bank v. Ferrera-Goitia, 316 F.3d 62, 66 (1st Cir. 2003).[8]

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[8] While other First Circuit cases have held that motions brought under Fed. R. Civ. P. 60(b)(4) may be made at any time, these cases focus on the lack of personal jurisdiction. See Sea-Land Service, Inc. v. Ceramica Europa Hato Rey, Inc., 160 F.3d 849, 852 (1st Cir. 1998); Precision Etchings & Findings, Inc. v. LGP Gem, Ltd., 953 F.2d 21, 23 (1st Cir. 1992) (same). But see United States v. Boch Oldsmobile, Inc., 909 F.2d 657, 661 (1st Cir. 1990) (finding 60(b)(4) motion was not timely filed, but still considered whether the judgment was indeed void – it was not – even though there was no challenge to jurisdiction or alleged due process violation).

At the time the Second Motion to Vacate was filed, the Sale Order had been entered over two and one half years prior and had been the subject of numerous Petitioner appeals. There is simply no justification for this delay. The delay in bringing the Second Motion to Vacate "did not stem from ignorance of what had transpired," id. at 67, since Petitioner has been actively involved in the case from the outset, and well aware of applicable deadlines for objections and other pleadings. The Second Motion to Vacate is exactly what it appears to be – another attempt to prolong the Sale Order litigation and extract payments form the Trustee or Kubotek that Petitioner is not entitled to. Indeed, Petitioner gives no meaningful reason justifying the delay in filing his motion – only that he waited to see whether this Court would grant his first certiorari petition concerning his first appeal of the Sale Order. As soon as he learned his petition would not be granted, he filed yet another motion, with many of the same arguments, to attack the Sale Order.

Moreover, substantial prejudice would result from a reversal of the Sale Order on appeal. Such a reversal would likely have a disastrous effect on Kubotek's business and countless third parties, including post-acquisition creditors, customers and employees. Kubotek has operated the Debtor's former business since December 2003, paying employee wages and benefits, servicing customers and otherwise performing the obligations formerly performed by the Debtor. As the Bankruptcy Court noted,

> Over two and one-half years have passed since the issuance of the challenged order. White never obtained a stay pending appeal. Undoubtedly, the assets have now become well integrated into Kubotek's business.

[Pet. App. p. 11.] For these reasons, the Second Motion to Vacate can hardly be viewed as having been filed within a reasonable time.

3. The Sale Order is not Void, Because Petitioner's Due Process Rights Were Not Violated

In addition to the Motion's being untimely, Petitioner's argument that the Sale Order is void is wholly without merit. As the First Circuit has explained, "[a] judgment is void, and therefore subject to relief under Rule 60(b)(4), *only* if the court lacked jurisdiction *or* in circumstances in which the court's action amounts to a plain usurpation of power constituting a violation of due process." United States v. Boch Oldsmobile, Inc., 909 F.2d 657, 661 (1st Cir. 1990). A judgment is not void simply because it is or may have been erroneous; it is void only if, from its inception, it was a legal nullity. Id. at 661; Lubben v. Selective Serv. Sys. Local Board No., 453 F.2d 645, 649 (1st Cir. 1972). "In the interests of finality, the concept of void judgments is narrowly construed." Id. at 661 (quoting United States v. Berenguer, 821 F.2d 19, 22 (1st Cir. 1987)). Given these strict requirements for relief, it is apparent that the Bankruptcy Court,

District Court, and First Circuit properly denied Petitioner's latest attack on the Sale Order.

In this case, Petitioner does not contest that the Bankruptcy Court had jurisdiction to enter the Sale Order. Instead, he makes an argument that the Sale Order deprived him of his right to due process. But that argument is unavailing. Section 363(b)(1) of the Bankruptcy Code provides that the trustee may use, sell or lease estate property only "after notice and a hearing." 11 U.S.C. § 363(b)(1). As this Court has noted, due process requires "notice reasonably calculated, under all the circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (citations omitted).

Petitioner has not been denied due process. From the first days of the case, Petitioner was informed of the Sale Motion. He presented his objections thereto with various filings and appearances at the sale hearings, at which able counsel represented him. Given Petitioner's participation in the sale process and subsequent appeals, and his role as a member of the Committee, his due process claim is simply frivolous. There has been no denial of due process in this case. And, there is simply nothing about the manner in which the Sale Hearings were conducted that "offends principals [sic] of equity and justice," as Petitioner contends. Petition at p. 38.

Thus, at bottom, the Second Motion to Vacate represents nothing more than an attempt to present new arguments – or slightly modified arguments – challenging the merits of the Sale Order, at the continuing expense of the Debtor's estate. The Motion seeks to present these arguments again by misusing Fed. R. Civ. P. 60(b)(4), and mischaracterizing the Sale Order as void, when Petitioner's due process rights were, in fact, scrupulously protected. Petitioner has been afforded a full and fair opportunity to present his objections to and appeals of the Sale Order – all of which have been considered and rejected by the Bankruptcy Court, this District Court, the Bankruptcy Appellate Panel of the First Circuit, and the First Circuit. Indeed, Petitioner made a similar due process argument in his prior petition filed with this Court – an argument that the Court apparently gave little or no weight when it denied that petition.

The law is clear: a motion under Fed. R. Civ. P. 60(b) cannot be used as a vehicle to relitigate matters previously decided by the courts. See Geo P. Reintjes Co., Inc. v. Riley Stoker Corp., 71 F.3d 44, 49 (1st Cir. 1995) (citing 7 J. Moore, Moore's Federal Practice ¶ 60.37 (1995)). In affirming the Bankruptcy Court order, the District Court properly concluded:

> [It was not] improper for the Bankruptcy Court to deny [White's] second Motion to Vacate Sale Order, which was nothing more than an attempt to relitigate – for the third time the propriety of the Sale Order. The

> record reveals no merit in [White's] claim that the entry of the Sale Order violated due process. Moreover, White's motion – filed over two and one-half years after entry of the Sale Order – was untimely. See Fed. R. Civ. P. 60(b) (requiring motions pursuant to Fed. R. Civ. P. 60(b)(4) to "be made within a reasonable time").

[Pet. App. p. 6.] The First Circuit agreed, ruling that:

> The record indicates that White was given prior notice of the sale of debtor's assets and the opportunity to challenge that sale. Hence any claim that the sale violated his rights to due process is without foundation.

[Pet. App. p. 3.]

4. Petitioner's Substantive Arguments in Support of the Second Motion to Vacate Need Not Be Considered by this Court on Appeal, and are Without Merit in Any Event

Under First Circuit precedent, appellate courts only look to the propriety of the denial of the motion for relief from judgment, and will not consider the merits of the underlying judgment. See Hoult v. Hoult, 57 F.3d 1, 3 (1st Cir. 1995). Accordingly, it would have been entirely appropriate

for the First Circuit to deny the Second Motion to Vacate by concluding that Petitioner has failed to meet the Fed. R. Civ. P. 60(b) standard alone, without considering Petitioner's substantive arguments.[9] The majority of the arguments set forth in Petitioner's First Circuit brief (and repeated in the Petition) address the merits of the Sale Order, and are not relevant to this appeal. Moreover, Petitioner's failure to raise many, if not all, of the arguments in his objection to the Sale Order and his First Motion to Vacate precludes their consideration here.[10]

In any event, Petitioner's substantive arguments are meritless. A party's right to royalties based on product sales does not give the party an interest in the property sold entitled to protection under Section 363(f) of the Bankruptcy Code. And even if it did, Petitioner received notice of the Sale Motion, and failed to raise this argument in the White Objection, or seek adequate protection of his alleged interest; thus, he is precluded from doing so now. See Precision Industries, Inc. v. Qualitech

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[9] It is unclear whether the First Circuit considered White's arguments. The judgment only states that the First Circuit "carefully reviewed the record in this case, including the briefs of the parties." [Pet. App. p. 2.]

[10] Most, if not all, of those substantive arguments have already been rejected by the District Court in its denial of White's appeal of the Sale Order and the First Motion to Vacate. They were also rejected by the First Circuit in connection with White's appeal of the Sale Order, and by this Court in connection with his first petition for certiorari.

Steel SBQ, LLC, 327 F.3d 537, 548 (7th Cir. 2003).[11] Petitioner even failed to raise the argument in his appeal of the Sale Order, and in the First Motion to Vacate. Had he timely raised the argument, he certainly would have been told by the Bankruptcy Court that, to the extent he held a cognizable interest in the Debtor's assets (which the Trustee does not concede), those assets could nonetheless be sold pursuant to Section 363(f)(1) of the Bankruptcy Code,[12] and that Petitioner's "interest" in the assets – consisting of an unsecured claim, no different than the claims of all of the Debtor's other unsecured creditors – would be adequately protected by preserving for him the right to file a claim and be

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[11] In this appeal, White now complains, for the first time, that he was misled by a schedule of "Assigned Contracts" attached to the Asset Purchase Agreement filed by Kubotek with the Bankruptcy Court on or about October 16, 2003, which provided that the Acquisition Agreement – which he now admits was not an executory contract – would be assumed by the Debtor and assigned to Kubotek if Kubotek were the successful bidder at auction. White points out that, later in the case, prior to the Sale Hearing, the Agreement was removed from the list of "Assigned Contracts," and later rejected by the Debtor. White fails to explain how these facts are relevant or caused him any prejudice, particularly in light of his own position that the Agreement could neither be assumed nor rejected under the Bankruptcy Code. Nor does he explain why he failed to raise this issue in connection with his appeal of the Sale Order, or in his First Motion to Vacate.

[12] Section 363(f)(1) permits assets to be sold free and clear of liens and interests if permitted by applicable nonbankruptcy law. Certainly, that is the case here – creditors holding mere unsecured claims cannot, even if those claims are construed as "interests" in the Debtor's business assets, block a sale of those assets under state law.

paid his share of the sale proceeds, pro-rata with all other unsecured creditors of the Debtor's estate.

Lastly, Petitioner's argument concerning the "absolute priority rule" is misplaced. As the Bankruptcy Court correctly noted,

> The "absolute priority rule" is a colloquialism describing the right of a debtor to have a Chapter 11 plan confirmed over the objection of a dissenting class of unsecured creditors by meeting a condition described in 11 U.S.C. § 1129(b)(2)(B)(ii). The absolute priority rule has no application here, as the Debtor's assets were sold under § 363 of the Bankruptcy Code, and not pursuant to a Chapter 11 plan.

[Pet. App. p. 12.] In sum, none of Petitioner's substantive arguments warrants further consideration by this Court. Accordingly, and, more importantly, because the Second Motion to Vacate fails utterly to meet the requirements for relief under Fed. R. Civ. P. 60(b)(4), the First Circuit judgment upholding the Bankruptcy Court's order denying the Second Motion to Vacate was appropriate.

B. Based on the Record of this Case, the Bankruptcy Court Did Not Abuse its Discretion in Restraining and Enjoining Petitioner from filing, Pro Se, Any Further Documents, Except in a Limited Set of Circumstances

The Bankruptcy Court properly determined that "a federal court may, in appropriate circumstances and with a well-tailored order, prospectively bar an abusive *pro se* litigant from filing papers." [Pet. App. p. 14.] It is well established that "[f]ederal courts ... possess discretionary powers to regulate the conduct of abusive litigants." Cok v. Family Court of Rhode Island, 985 F.2d 32, 34 (1st Cir. 1993)(per curiam). Thus, "in extreme circumstances involving groundless encroachment upon the limited time and resources of the court and other parties, an injunction barring a party from filing and processing frivolous and vexatious lawsuits may be appropriate." Castro v. United States, 775 F.2d 399, 408 (1st Cir. 1985)(per curiam), rev'd on other grounds, Stevens v. Dept. of Treasury, 500 U.S. 1 (1991). Given Petitioner's continued abusive motion practice, the Bankruptcy Court correctly decided that such relief would be entirely appropriate in this case.

In structuring the injunction, the Bankruptcy Court was guided by the First Circuit's decision in Cok, noting that an order regulating Petitioner's abusive motion practice required that:

> A sufficient record must be established to support and justify such an order. Cok, 985 F.2d at 35. The litigant must be warned that such filing restrictions are being contemplated and given an opportunity to oppose them. Id. There should be no reasonable alternative. Id. at 36. And the restrictions must not be of unlimited breadth. Id. They must be tailored to deal with the problems identified by the Court.

[Pet. App. p. 14.] In this case, the support and justification for the imposed filing restrictions were more than sufficiently established in the record. Indeed, the Bankruptcy Court had only recently entered an order that cataloged Petitioner's misuse of the bankruptcy process, determining that "the various forms of relief requested by Petitioner have long ago moved beyond frivolous to the malicious and vexatious." [Bankr. Docket No. 727, p. 18.] Petitioner was served with the Objection of Chapter 7 Trustee to Robert White's Motion to Vacate Sale Order, wherein the Trustee renewed his previous request to the Bankruptcy Court for the issuance of an injunction to prohibit Petitioner from filing any further pleadings concerning the Chapter 7 case.[13] [Bankr. Docket No. 750.] At the hearing on the Second Motion to Vacate, Petitioner was given an opportunity to object to the requested prohibition, but declined to do so. Given these factors,

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[13] White was also aware of the Bankruptcy Court's regret at not having issued such an order when first requested by the Trustee. [Bankr. Docket No. 727, n.12.]

Petitioner's assertion that he "was not given any warning of the Bankruptcy Court's pre-filing injunction nor given an opportunity to oppose it," Petition at pp. 41-42, is simply not credible and contradicted by the facts in the record.[14] Instead of presenting any arguments in opposition to the Trustee's request for a preliminary injunction in the first instance, Petitioner chose to file this appeal.

The filing restrictions imposed by the Bankruptcy Court are appropriate, and the only reasonable means available for protecting the Debtor's estate and the integrity of the bankruptcy process. Petitioner's refusal to abide by earlier Bankruptcy Court orders – monetary and contempt sanctions – demonstrates the need for the restrictions, as well as the absence of any viable alternative. Petitioner's repetitive, improper, and meritless litigation tactics are clearly intended to harass the Trustee and delay administration of the Chapter 7 case, in order to compel the Trustee to reach a financial settlement with Petitioner. In enjoining Petitioner from filing *pro se* papers, the Bankruptcy Court recognized that it is simply not fair to the remaining unsecured creditors for the

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[14] White's arguments that the Trustee's request for an injunction were procedurally inadequate are unavailing. White suggests that the Trustee should have filed a separate motion for sanctions, but this was not a request for sanctions. Nor is the Bankruptcy Court required to issue a show cause order. The procedures followed by the Trustee and the Bankruptcy Court in this case were exactly what the First Circuit required in Cok: notice of the request for an injunction and an opportunity to be heard in opposition to the request. White's due process rights, which have been scrupulously protected in this case, require nothing more.

estate to be forced to defend against his continued abuse of the bankruptcy process. Absent the Bankruptcy Court injunction, Petitioner would continue to litigate (and relitigate) the Sale Order at the expense of the estate, even though his appellate avenues have been completely closed. Accordingly, the Bankruptcy Court order enjoining Petitioner from filing, *pro se*, any further documents with the Bankruptcy Court in the Chapter 7 case, except under a limited set of circumstances, was an entirely appropriate. As the District Court noted,

> [I]n light of [White's] excessive filings and abusive motion practice, the Bankruptcy Court's decision to bar [White] from filing additional papers, except in two narrow circumstances, was well within its discretionary power "to regulate the conduct of abusive litigants." Cok v. Family Court of R.I., 985 F.2d 32, 34 (1st Cir. 1993)(per curiam).

[Pet. App. p. 6.] The First Circuit concurred, holding that,

> [T]he order limiting White's ability to file further actions in this case is well supported by the record and properly crafted to prevent further inappropriate filings in this case.

[Pet. App. p. 3.] White has presented no argument, other than a due process allegation based on his improper mischaracterization of the record, that

would justify a result contrary to those ordered by the District Court and the First Circuit. His request for relief from the Bankruptcy Court's injunction should be denied by this Court as well.

C. The First Circuit Properly Affirmed the Bankruptcy Court Denial of the Application for Payment

Petitioner's right to payment of royalties pursuant to the terms of the Acquisition Agreement is a garden-variety prepetition claim. Petitioner has provided no postpetition services, or other benefit, to the Debtor's estate, and accordingly there is no basis for elevating his prepetition royalty claim to priority administrative expense status. In fact, in denying the Application for Payment, the Bankruptcy Court did not need to look further than the Application for Payment itself to recognize Petitioner's argument is wholly without merit, and the First Circuit agreed with that decision.

Pursuant to the Application for Payment, Petitioner states that the Acquisition Agreement is a

non-executory contract,[15] and admits (i) that he completed his performance under the Acquisition Agreement prepetition (by transferring his rights in the software at issue to the Debtor), (ii) that he has not provided any services to the Debtor postpetition, and (iii) that the only remaining obligation under the Acquisition Agreement is the payment of royalties. [Bankr. Docket No. 764.]

Section 503(b) of the Bankruptcy Code provides in pertinent part that "there shall be allowed administrative expenses ... including ... the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case." 11 U.S.C. § 503(b)(1)(A). The Bankruptcy Court correctly noted that, in order for Petitioner's

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[15] The Trustee acknowledges that on January 9, 2004, the Debtor filed a Motion Pursuant to Section 365 of the Bankruptcy Code, and Federal Rules of Bankruptcy Procedure 6006 and 9014 for an Order Authorizing (I) the Assumption and Assignment of Certain Executory Contracts to Kubotek USA, Inc. and (II) the Rejection of Certain Executory Contracts (the "Rejection Motion"), whereby the Debtor purportedly sought to reject the Acquisition Agreement. [Bankr. Docket No. 230.] The Court granted the Rejection Motion on January 27, 2004. [Bankr. Docket No. 235.] The Trustee agrees with White that the Acquisition Agreement is not an executory contract, and submits that the Rejection Motion merely listed the Acquisition Agreement as one of many contracts to be rejected, probably as a precautionary measure given White's litigious nature. In any event, the Rejection Motion cannot transform a non-executory contract to an executory contract simply by listing it in the exhibits of a pleading. Even assuming that the Acquisition Agreement was an executory contract that was rejected by the Debtor, White's request for an administrative expense claim would be unavailing. See In re Enron Corp., 279 B.R. 695 (Bankr. S.D.N.Y. 2002).

claim for royalties arising under the Acquisition Agreement from July 1, 2003 to December 3, 2003 (the "Royalty Claim") to be afforded administrative expense status, Petitioner must show that his right to the payment of such royalties (1) arises from a transaction with the trustee or debtor-in-possession, rather than from a prepetition transaction with the Debtor, and (2) the consideration supporting the claim must have benefited the estate in some demonstrable way. See Mason v. Official Comm. of Unsecured Creditors (In re FBI Distribution Corp.), 330 F.3d 36, 42 (1st Cir. 2003) (emphasis added); In re O'Brien Envtl. Energy, Inc., 181 F.3d 527, 532-33 (3d Cir. 1999); Cramer v. Mammoth Mart, Inc. (In re Mammoth Mart, Inc.), 536 F.2d 950, 954 (1st Cir. 1976). The Application for Payment does not meet either of these requirements.

There was, as the Bankruptcy Court found, no postpetition agreement between the Debtor and Petitioner, and no apparent benefit to the estate from this alleged "transaction." Clearly, as concluded by the Bankruptcy Court, Petitioner's right to payment of the royalty arises out of a prepetition contract with the Debtor, not from a postpetition transaction with the Trustee or Debtor. Indeed, a portion of the Royalty Claim was supposedly generated in the prepetition period. Further, Petitioner admits that he has provided no services to the Debtor postpetition. The royalties imposed under the Acquisition Agreement do not confer a benefit upon the estate, or otherwise constitute an actual, necessary cost of preserving the estate, because the benefit provided to the Debtor thereunder – the transfer of FastSURF's rights in

certain computer programs – was entirely complete prepetition. In light of these facts, the imposition of a postpetition royalty imposes a burden, not a benefit. Petitioner's Royalty Claim is a prepetition claim arising out of a prepetition contract, plain and simple.

Contrary to Petitioner's suggestion otherwise, Petitioner's Royalty Claim is not entitled to priority simply because the right to payment was triggered by postpetition product sales. In FBI Distribution, the First Circuit held that a claim for postpetition payments, pursuant to a prepetition non-executory retention agreement, was a contingent claim and was not entitled to administrative priority simply because the right to payment arose during reorganization when the contingency occurred. FBI Distribution, 330 F.3d at 48.

Similarly, in In re Waste Systems Int'l, Inc., 280 B.R. 824, 827 (Bankr. D. Del. 2002), the court denied administrative expense status to a claim for royalties generated from postpetition sales pursuant to a prepetition non-executory contract, stating:

> [Claimant] asserts that the royalty payments due under the Consulting Agreement are post-petition administrative claims because the payments arise only after [the debtor] delivers waste to the [waste facility]. We disagree. The obligation to make the royalty payments arose when the Consulting Agreement was executed pre-petition. The fact that the pre-

> petition obligation is dependent upon the occurrence of a post-petition event does not make the obligation an administrative claim. Whether the event occurs or not determines the amount of the contingent claim, not its priority (internal citations omitted).

Waste Systems, 280 B.R. at 827. Just as in FBI Distribution and Waste Systems, the Debtor's obligation to make royalty payments arose prepetition – at the time the Acquisition Agreement was executed – and the fact that the payments are dependent on the occurrence of postpetition sales does not transform the claim from a mere unsecured non-priority claim to an administrative expense.

Petitioner's other arguments (not raised in the Bankruptcy Court) for administrative expense status need not be considered by this Court,[16] and, in any event, are similarly unavailing. While acknowledging that the Acquisition Agreement is a non-executory contract, Petitioner makes the nonsensical arguments that the Acquisition Agreement (i) was a Section 363 transaction with the debtor-in-possession that requires payment in the "ordinary course of business," Petition at pp. 22-24, or (ii) "survives a non-plan sale." Petition at pp. 24-

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[16] "It is well established that appellate courts will not consider an issue which was not before the trial court and which is first raised on appeal." In re Weinstein, 217 B.R. 5, 8 (D. Mass. 1998) (citing Singleton v. Wulff, 428 U.S. 106, 120 (1976)); see also In re Rauh, 119 F.3d 46, 51 (1st Cir. 1997) (refusing to consider a new theory of the case first raised on appeal since it had not been presented to the bankruptcy court).

26. With respect to the "survival" argument, Petitioner is just duplicating his Section 363(f) argument, which is legally incorrect and, in any event, not preserved for this appeal (see pp. 24-25 above).

In sum, as noted by the First Circuit [Pet. App. p. 3], claims arising from prepetition non-executory contracts, such as the Royalty Claim, are merely general unsecured claims. See FBI Distribution Corp., 330 F.3d at 48; Stewart Foods Inc. v. Broecker (In re Stewart Foods, Inc.), 64 F.3d 141, 145 (4th Cir. 1995) ("regardless of the nature of the contract, if at the time of the bankruptcy filing the debtor has an obligation under the contract to pay money to the non-debtor party, that obligation is handled as a pre-petition claim in the bankruptcy proceedings."). Petitioner has the right to have the amount of the Royalty Claim – including potential future royalties payable under the Acquisition Agreement –be determined by the Bankruptcy Court, and to share *pro-rata* in distributions paid to all unsecured creditors, based on the amount of the Royalty Claim. However, in the absence of a transaction with the postpetition Debtor and any benefit to the Debtor's estate, he is not entitled to have that claim paid prior to the claims of all of the Debtor's other unsecured creditors.

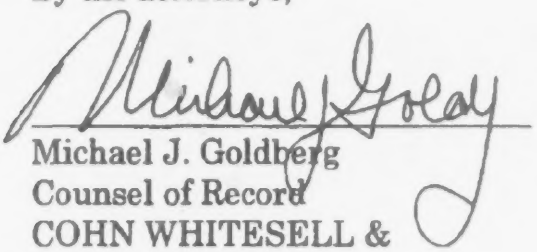
Conclusion

Based on the foregoing, the Petition should be denied, and the Bankruptcy Court's orders permitted to stand.

Dated: February 20, 2008

JOSEPH B. COLLINS
Chapter 7 Trustee of
CK Liquidation Corporation

By his attorneys,



Michael J. Goldberg
Counsel of Record
COHN WHITESELL &
GOLDBERG LLP
101 Arch Street
Boston, MA 02110
Telephone: (617) 951-2505
Facsimile: (617) 951-0679
Email: *goldberg@cwg11.com*